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No. 91-573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PABLO PIRELA,

Petitioner,

v.

VILLAGE OF NORTH AURORA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

D. KENDALL GRIFFITH
Counsel of Record
PAUL L. PAWLOWSKI
RONALD L. KAMMER
GERALD HABERKORN
HINSHAW & CULBERTSON
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601-1081
(312) 704-3000

Counsel for Respondent

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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OPINION BELOW

The respondent, Village of North Aurora, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 935 F.2d 909 (1991).

JURISDICTION

The petitioner, Pablo Pirela, asserts that jurisdiction is invoked under 28 U.S.C. § 1254(a). However, 28 U.S.C. § 1254(a) is non-existent. Petitioner apparently is relying upon 28 U.S.C. § 1254(1).

STATEMENT OF CASE

The Village of North Aurora adopts the statement of case as appearing in the petition beginning at page 7. The following additional facts are presented.

In April, 1986, Police Chief Edward Kelly brought a complaint against Pablo Pirela, a police officer for the Village of North Aurora ("Village"), and another police officer, Stephen Adams.[1] The two were accused of six infractions of the rules and regulations of the North Aurora Police Department. (R. 12 at 29; Pet. App. 24) The Board of Fire and Police Commissioners of the Village of North Aurora ("Board") conducted a hearing on the charges on April 24, 1986. (R. 12 at 29; Pet. App. 24) Throughout the hearing, Pirela and Adams were present with legal counsel of their own selection. All witnesses were sworn in, testified under oath and were subject to cross-examination. (R. 12 at 30; Pet. App. 24)

At the conclusion of the hearings, the Board found that the Village had met their burden of proof and that the two were guilty of the misconduct as alleged in Counts I, II, III, IV and VI of the charges. The Board found that the Village had not met their burden of proof and that Pirela was not guilty of the alleged misconduct alleged in Count V of the charge. (R. 12 at 3; Pet. App. 24)

Count V alleged that Pirela struck an individual who had earlier made a statement to the North Aurora Police Department regarding a prior incident involving Pirela. (R. 12 at 30; Pet. App. 25)

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[1] Police Officer Stephen Adams is not a party to these proceedings.

Count I alleged that Pirela and Adams, on February 7, 1986, while under the influence of alcoholic beverages, became involved in an altercation at a tavern, resulting in the North Aurora Police being called to the scene. (R. 12 at 32-33; Pet. App. 26)

Count II alleged that Pirela and Adams were under the influence of alcoholic beverages while on duty, during which time Pirela had been seen three times driving a police vehicle and weaving on the road. (R. 12 at 36-37; Pet. App. 29)

Count III was directed solely against Officer Adams.

Count IV alleged that Pirela, while on duty, returned car keys to an intoxicated individual who later drove away. (R. 12 at 39; Pet. App. 31)

Count VI alleged that Pirela remained in a liquor establishment located in the Village of North Aurora beyond the lawful closing time of that establishment and was seen exiting the liquor establishment carrying a six-pack of beer. (R. 12 at 39; Pet. App. 31)

Following the Board's decision, Pirela filed a complaint with the Sixteenth Judicial Circuit requesting judicial review of the Board's decision. The circuit court affirmed. (R. 40 at 4)

REASONS WHY THE PETITION SHOULD BE DENIED

1. Illinois law gives the prior state court judgment in this case preclusive effect. As a result, 28 U.S.C. § 1738 requires the preclusion of petitioner's Title VII claims.

Under *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 480-482, 102 S.Ct. 1883 (1982), application of

§ 1738 is dependent first, on whether the state administrative and judicial review proceedings are sufficient to be given preclusive effect in the state, and second, on whether the party against whom preclusion is asserted had a full and fair opportunity to litigate the claim. Pirela argues that this test has not been met by asserting that the Board is not authorized to resolve Title VII issues and lacks pretrial discovery procedures to handle discrimination claims. Neither assertion is supported by Illinois law.

Pirela cites ch. 24, sec. 10-1-1 *et seq.*, Ill.Rev.Stat. (1985) entitled "Employers and Employment (Civil Service)" to support his claim that the Board can not hear discrimination claims. Chapter 24 does not provide that the board is unable to hear discrimination claims. Instead in § 10-2.1-17 specifically provides:

> Except as hereinafter provided, no officer or member of the fire or police department of any municipality subject to this Division 2.1 shall be removed or discharged except for cause, upon written charges, *and after an opportunity to be heard in his own defense.*

(Resp. App. 1, emphasis added) Thus, if Pirela believed his discharge was discriminatory, he could raise that as a defense.

Moreover, Pirela could have raised his discrimination claim in the Illinois circuit court during his appeal from the Board's decision. *Lee v. City of Peoria*, 685 F.2d 196 (7th Cir. 1982). In *Lee*, a police officer was brought before the Peoria Board of Fire and Police Commissioners (created under the same provision of Chapter 24 as the Board in this case) for allegedly giving false testimony before the Peoria Board in a previous matter. Lee filed a complaint for administrative review of the Peoria Board's adverse decision in the Circuit Court of Peoria County. In his com-

plaint, Lee claimed that his discharge was the result of racial discrimination by the Board as well as the City and that it was in violation of due process. The circuit court found that "the decision of the Department Board is sustained by the greater weight of the evidence and is not contrary to the manifest weight of the evidence."

After the Board's decision and before the circuit court's decision, Lee filed a charge of racial discrimination with the EEOC against the City of Peoria and the Board pursuant to Title VII. Lee was issued his "Notice of Right-to-Sue" under Title VII and filed his civil rights suit in district court. The district court dismissed Lee's claim on grounds of *res judicata* and collateral estoppel.

The Seventh Circuit affirmed the dismissal relying, in large part, on two Supreme Court cases, *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411 (1981) (not cited in the petition) and *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883 (1982). Applying the rationale of both *Allen* and *Kremer*, the Seventh Circuit in *Lee* found "no reason to distinguish civil rights actions brought under Sections 1981, 1983 and 1985 from suits brought under Title VII for purposes of applying *res judicata*." 685 F.2d at 200-201. Thus, *Lee* held that applying *res judicata* in a civil rights action bars a suit even as to issues which could have been, but were not, litigated in a prior state proceeding. The court stated:

> . . . the Board determined after a hearing that Lee was guilty of the charges against him and ordered dismissed. *He could have raised the defense of racial discrimination to the charges*, but did not do so. Lee petitioned for review to the state circuit court, claiming also that the Board's dismissal of him was racially motivated and violated due process. It does appear to us that if in fact he had been discharged solely because of

> racial discrimination, he was not in fact or in law discharged because of the false testimony. This would have been a complete defense. Despite Lee's assertions to the contrary, *the state circuit court had jurisdiction to review the allegations* . . .

(emphasis added) 685 F.2d at 200-201.

Although Pirela cites the Illinois Human Rights Act (Pet. 11-12), he identifies no provision granting exclusive jurisdiction over such claims to agencies authorized by that Act or precluding the Board from hearing discrimination claims. The Act, instead, provides:

> (c) Limitation. Except as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act.

Illinois Revised Statutes 1985, ch. 68, par. 8-111(c); Pet. App. 41-62. This provides no limitation on the hearing of civil rights claims by administrative agencies.

In *Mein v. Masonite*, 109 Ill.2d 1, 485 N.E.2d 312 (1985), the court concluded par. 8-111(c) precludes bringing an original action grounded on a violation of the Illinois Human Rights Act in the circuit court. The Human Rights Act therefore precludes direct access to the circuit courts for redress of civil rights violations. See also, *Bd. of Trustees v. Ill. Human Rights Com.*, 141 Ill.App.3d 447, 490 N.E.2d 232 (1986). However, there is no support for the statement that the Illinois Human Rights Commission must hear civil rights claims to the exclusion of the Board.

Nor is Pirela correct in asserting that the Board had no pretrial discovery procedures available. Chapter 24, § 10-2.1-17, Ill. Rev. Stat. (1985) provides for subpoena power for the production of both witnesses and documents. (Resp. App. 1)

Thus, Pirela has not identified grounds to reverse the Seventh Circuit's holding that the Illinois *res judicata* doctrine would preclude this claim and that Pirela had a full and fair opportunity to pursue his claim in the prior state proceeding.

2. The Seventh Circuit has not misapplied *Kremer* by holding that all issues are barred, even those not actually litigated in the prior proceeding.

Kremer barred an issue actually litigated because it applied the doctrine of collateral estoppel or issue preclusion. A requirement of that doctrine is that only issues actually litigated in the prior action are precluded. *Brown v. Felsen*, 442 U.S. 127, 138, n. 10, 99 S.Ct. 2205 (1979); *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970 (1979).

However, *res judicata* or claim preclusion bars not only those issues actually litigated, but those issues that could have been litigated. *Id. Kremer* indicates that *res judicata* is applicable in Title VII cases. 456 U.S. at 481, n. 22. Significantly, the cases cited by Pirela as in conflict with the Seventh Circuit's application of *Kremer* to an issue not litigated in the prior proceeding (Pet. 13) all involve applications of issue preclusion.

3. The Illinois doctrine of *res judicata* would give the Board's decision preclusive effect.

Pirela's contention to the contrary (Pet. 14-18) ignores the Illinois law of *res judicata* as discussed in the Seventh Circuit's opinion. (Pet. App. 4-6) As already noted, Pirela's reliance on the Board lacking both the authority to hear his discrimination claim and pretrial discovery procedures is misplaced.

4. The Seventh Circuit's decision has not created a division in the circuits regarding application of *res judicata* to employment discrimination claims.

The cases cited by Pirela as creating a split in the circuits (Pet. 18-19) do not hold that *res judicata* does not apply to employment discrimination claims. Rather they hold that, on the facts presented, a requirement of the particular state's *res judicata* doctrine was not satisfied. The cases then held that because the missing requirements would prevent the states from giving preclusive effect to the states decisions, the federal courts were not required to do so. Here on the facts presented, the Seventh Circuit found that the requirements of the Illinois *res judicata* doctrine were met. Thus, Illinois would give preclusive effect to the Board's decision. This does create a conflict.

Pirela's statement that *Owens v. N.Y.C. Housing Authority*, 934 F.2d 405 (2nd Cir. 1991) found that Owens did not have a full and fair opportunity to bring her discrimination claim is erroneous. Instead, the court found that the state court issue—misconduct—was resolved after a full and fair opportunity to contest it, but that that was not the issue defendant claimed was precluded. 934 F.2d at 409. Thus, the decision was based on one of the requirements of issue preclusion not having been met, not on the inapplicability of *res judicata* or collateral estoppel to employment discrimination.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

D. KENDALL GRIFFITH
Counsel of Record
PAUL L. PAWLOWSKI
RONALD L. KAMMER
GERALD HABERKORN
HINSHAW & CULBERTSON
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601-1081
(312) 704-3000

Counsel for Respondent

APPENDIX

10-2.1-17. Removal or discharge—Investigation of charges—Retirement—Review under Administrative Review Law

§ 10-2.1-17. Removal or discharge—Investigation of charges—Retirement. Except as hereinafter provided, no officer or member of the fire or police department of any municipality subject to this Division 2.1 shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. If the chief of the fire department or the chief of the police department or both of them are appointed in the manner provided by ordinance, they may be removed or discharged by the appointing authority. In such case the appointing authority shall file with the corporate authorities the reasons for such removal or discharge, which removal or discharge shall not become effective unless confirmed by a majority vote of the corporate authorities. The board of fire and police commissioners shall conduct a fair and impartial hearing of the charges, to be commenced within 30 days of the filing thereof, which hearing may be continued from time to time. In case an officer or member is found guilty, the board may discharge him, or may suspend him not exceeding 30 days without pay. The board may suspend any officer or member pending the hearing with or without pay, but not to exceed 30 days. If the Board of Fire and Police Commissioners determines that the charges are not sustained, the officer or member shall be reimbursed for all wages withheld, if any. In the conduct of this hearing, each member of the board shall have power to secure by its subpoena both the attendance and testimony of witnesses and the production of books and papers relevant to the hearing.

The age for retirement of policemen or firemen in the service of any municipality which adopts this Division 2.1 is 65 years, unless the Council or Board of Trustees shall by ordinance provide for an earlier retirement age of not less than 60 years.

The provisions of the Administrative Review Law, and all amendments and modifications thereof,[2] and the rules adopted pursuant thereto, shall apply to and govern all proceedings for the judicial review of final administrative decisions of the board of fire and police commissioners hereunder. The term "administrative decision" is defined as in Section 3-101 of the Code of Civil Procedure.[3]

Nothing in this Section shall be construed to prevent the chief of the fire department or the chief of the police department from suspending without pay a member of his department for a period of not more than 5 calendar days, but he shall notify the board in writing of such suspension. Any policeman or fireman so suspended may appeal to the board of fire and police commissioners for a review of the suspension within 5 calendar days after such suspension, and upon such appeal, the board may sustain the action of the chief of the department, may reverse it with instructions that the man receive his pay for the period involved, or may suspend the officer for an additional period of not more than 30 days or discharge him, depending upon the facts presented.

Laws 1961, p. 576, § 10-2.1-17, added by Laws 1965, p. 2840, § 1, eff. Aug. 10, 1965. Amended by P.A. 76-1525,

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[2] Chapter 110, ¶ 3-101 *et seq.*

[3] Chapter 110, ¶ 3-101.

§ 1, eff. Sept. 22, 1969; P.A. 80-819, § 1, eff. Oct. 1, 1977; P.A. 82-783, Art. XI, § 54 eff. July 13, 1982; P.A. 85-915, § 1, eff. July 1, 1988.

Historical and Statutory Notes

P.A. 76-1525 authorized the Council or Board of Trustees to provide by ordinance for an earlier retirement age of not less than 60 years.

P.A. 80-819 inserted provisions governing removal or discharge of chiefs of the fire or police departments appointed by ordinance.

The amendments by P.A. 82-783, Art. XI were necessary to revise references to laws which were superseded by the Code of Civil Procedure, see ch. 110, ¶ 1-101 *et seq.*